Congress of the United States
Washington, DC 20510

June 21, 2002

The Honorable
John D. Ashcroft
Attorney General of the United States
U.S. Department of Justice
10th Street and Constitution Avenue, N.W.
Washington, DC 20510

Dear Mr. Attorney General:

We write to you to renew our request dated October 31, 2001 for information about the hundreds of individuals the U.S. Department of Justice has arrested and detained in connection with the investigation into the terrorist attacks on September 11th. Since we first wrote you on October 31st, it is even more clear that the Department has no acceptable legal basis for withholding this information and should disclose it without further delay.

We commend the Department and the FBI for their tireless work in seeking to bring suspected terrorists to justice. There is no question that preventing terrorism and prosecuting those who engage in terrorism is a priority for the Department, the FBI, and our nation. But the Department risks handing the terrorists a victory, if, as it works to prevent terrorism, it cedes a commitment to fundamental constitutional principles.

The Department's blanket policy of secret arrests and detentions have not withstood public, congressional, and, now, judicial scrutiny. Our nation has a long history of ensuring that the arrest and detention of individuals are matters of public record. "The requirement that arrest books be open to the public is to prevent any 'secret arrests,' a concept odious to a democratic society. . . ." Morrow v. District of Columbia, 417 F.2d 728, 741-42 (D.C. Cir. 1969). A number of court decisions in recent weeks, including two federal appellate court decisions, have rejected the Department's arguments for secret immigration hearings, ruling that a blanket policy of closing immigration hearings violates the Constitution. See Detroit Free Press v. Ashcroft, No. 02-70339, slip op. (E.D. Mich. Apr. 3, 2002), No. 02-1437, slip op. (6th Cir. Apr. 18, 2002) (denying government's request for stay of lower court's decision in favor of plaintiffs); North Jersey Media Group, Inc. v. Ashcroft, Civ. No. 02-967, slip op. (D.N.J. May 29, 2002),

North Jersey Media Group, Inc. v. Attorney General, denied sub nom., No. 02-2524, slip op. (3d Cir. June 17, 2002) (denying government's request for stay of lower court's decision in favor of plaintiffs).

In addition, we question the Department's continued failure to reveal any information about individuals being held as material witnesses, even the number of individuals or which courts have issued warrants. The only court that has considered these warrants in any kind of public proceeding, a federal district court in New York, recently ruled that the Department used the material witness authority improperly to lock up an individual, who had no involvement in or knowledge of the September 11th attacks, for almost three months. The federal judge found that the government exceeded its authority under the material witness statute when it jailed Osama Awadallah, a Jordanian student studying in California, in connection not with a criminal trial but with a grand jury proceeding.

Media reports have identified more than 20 individuals who may have been jailed for lengthy periods of time as material witnesses. All of these people appear to be Arabs or Muslims, and some apparently were never even questioned by a grand jury or court. A fundamental constitutional value of this country is that individuals may not be locked up unless they have been accused of or convicted of a crime. The material witness statute provides a very narrow exception, but only under very specific circumstances, and only until the witness's testimony can be preserved for trial. It was never intended to permit indefinite detention without charge or trial.

While the courts have struck down the Department's policy of secret hearings and criticized the Department's actions as exceeding its proper authority, the Department nevertheless appears to be intent on developing alternative policies to achieve the same objectives. We were deeply troubled to learn that following one New Jersey state court decision in April 2002 requiring the disclosure of the identities of INS detainees held in non-federal facilities, INS Commissioner James Ziglar issued a directive that attempts to undo this decision. That directive, or interim rule, forbids the disclosure by any state or local government entity of the name or other information relating to immigration detainees housed on behalf of the Immigration and Naturalization Service. See interim rule published at 67 Fed. Reg. 19508-11 (Apr. 22, 2002).

The INS claims that this interim rule was issued pursuant to its authority to interpret and enforce the Immigration and Naturalization Act (INA). But this rule exceeds the authority granted by Congress to the Attorney General and INS Commissioner to implement the INA. The general power granted by Congress to the Attorney General and INS Commissioner to interpret the immigration laws and to arrest and detain non-citizens for immigration violations cannot be reasonably interpreted to authorize a blanket policy of secret detentions. On the contrary, nothing in the INA

authorizes a blanket policy of keeping secret from the public basic information about detainees such as their identities and where they are being held. The Department's extraordinary policy violates fundamental constitutional rights and our nation's history of open judicial proceedings.

The interim rule also exceeds the Department's authority by attempting to require the states to implement a policy of secret detentions in violation of their own laws. A state's agreement to house federal immigration detainees under a voluntary contract does not license the Department to require state officials to keep secret the names and other information regarding those detainees contained in their own state records, especially when the state's legislature has expressly codified the common law requirement that arrest records be made public.

We have received and reviewed the Department's letter dated November 16, 2001, and accompanying documents responding to our October 31st letter. We have also reviewed the additional information that you and other Department officials have disclosed to the media, during the hearings held by the Senate Judiciary Committee, and to the federal court in response to a FOIA lawsuit filed by non-governmental organizations. These disclosures still fall short of a full and complete response to our October 31st letter.

Mr. Attorney General, you have said that reasoned discourse should prevail. We agree. In order to have that reasoned discourse, the Department should provide Congress and the American people with sufficient information to promote a fair and open dialogue and to make our oversight meaningful. The Senate Judiciary Committee oversight hearings in December 2001, court decisions, and media reports show that not all the detainees have had adequate access to counsel or due process. They show that the Congress has reason to test and examine the Administration's assertions that everyone's constitutional rights are being respected in this investigation.

We continue to seek the information about detainees requested in our October 31st letter, not simply as a result of concern for constitutional rights, but also as a result of our desire for effective law enforcement. It became clear during the Senate hearing on December 4, 2001, that the roadblocks to individuals' consulting with counsel not only cause great hardship to the detainees and violate their rights, but also hinder the investigation and waste the resources of law enforcement on detaining people who have no connection with terrorism.

Pursuant to our responsibility to exercise oversight of the Department, we urge you to provide a full response to our October 31, 2001, request for information about the detainees without further delay. We further request that you direct Commissioner Ziglar to rescind the interim rule prohibiting the release of information regarding detainees held

at the request of the INS in non-federal facilities, and we ask that this letter be considered in the INS rule-making proceeding.

We look forward to hearing from you.

Sincerely,

Russell D. Feingold
U.S. SENATOR

John Conyers, Jr.
U.S. REPRESENTATIVE

Edward M. Kennedy
U.S. SENATOR

James P. McGovern
U.S. REPRESENTATIVE

Jon S. Corzine
U.S. SENATOR

Sheila Jackson Lee
U.S. REPRESENTATIVE

Robert C. Scott
U.S. REPRESENTATIVE

cc: The Honorable James W. Ziglar
Commissioner
Immigration and Naturalization Service

Director, Regulations and Forms Services Division
Immigration and Naturalization Service
Re: INS No. 2203-02